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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

INTEREST OF THE AMICUS CURIAE

Amicus curiae Knights of Columbus is a fraternal organization of 1.5 million members, with a long history of pro-family advocacy. For example, *amicus* largely underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). *Amicus* has also filed briefs *amici curiae* in several of this Court's abortion cases, including *Webster*, *Akron*, *Hodgson*,

and *Rust*, as well as in other types of cases before the Court.

In the present brief *amicus* respectfully suggests a refinement of the historical analyses used by the pluralities in *Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), and *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989), and by the majority in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), in evaluating constitutional claims concerning conduct traditionally classified as *malum in se*.

Amicus does not believe its argument is otherwise addressed by the parties or by other *amici*. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Amicus respectfully suggests a refinement of the historical analyses used in *Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) (plurality opinion), *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989) (plurality opinion), and *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). In *amicus*'s view, acts like abortion that traditionally have been restricted as *mala in se* cannot give rise to a liberty interest under the Fourteenth Amendment. Moreover, the States by definition have a rational basis for criminalizing acts, like abortion, that are *mala in se*.

In *Bowers*, the Court, citing the "ancient roots," and long tradition of proscriptions against sodomy, found "at best, facetious" the claim that sodomy was a fundamental right. 478 U.S. at 192, 194. The plurality in *Michael H.* used a similar historical analysis in rejecting the claim that a natural father has a liberty interest in maintaining a relationship with a child he has fathered adulterously, despite

objections from the child's mother and her husband. And in *Barnes*, both the plurality and Justice Scalia consulted legal history in determining that the state had a sufficient interest in outlawing public nudity. At the same time, the Court has recognized liberty interests in activities that at least some states have outlawed. *See, e.g., Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (sending children to parochial schools); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (teaching children a foreign language).

In *amicus*'s view these cases are best understood as standing for the proposition that a practice that has traditionally been restricted as specifically *malum in se* is, by definition, not a protected liberty under the Fourteenth Amendment. But a practice that has been outlawed merely as *malum prohibitum* may still constitute such a liberty. Because the common law may readily be consulted on the question of what is or is not *malum in se*, this analysis provides a workable, bright-line distinction between activities like sodomy, polygamy, suicide, etc., on the one hand, and claimed rights to qualitatively different types of behavior, on the other.

The Court has held that the States' interest in preserving morality may itself be a rational basis for criminalizing certain types of conduct. *Bowers*, 478 U.S. at 196; *Parris Adult Theater I* v. *Slaton*, 413 U.S. 49, 61 (1973); *see also Barnes*, 111 S. Ct. at 2462 (plurality opinion); *id.* at 2468; (Scalia, J., concurring in the judgment). *Amicus* believes those cases are best understood as providing that the States by definition possess rational bases for criminalizing activities, like abortion, that are *mala in se*.

Abortion has always been regarded as *malum in se*, from the received English common law, through American common law and statutory law, right up until *Roe* v. *Wade*, 410 U.S. 113 (1973), declared it to be a fundamental right. Under *amicus*'s proposed analysis, abortion thus cannot be the subject of a protected liberty interest, and the States necessarily possess a rational basis for restricting it. *Roe* should therefore be overruled.

ARGUMENT

Amicus files this brief to propose a refinement of the historical analyses used in Chief Justice Rehnquist's plurality opinion in *Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), in Justice Scalia's plurality opinion in *Michael H.* v. *Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (plurality opinion), and in Justice White's opinion for the Court in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). In *amicus*'s view, an activity like abortion that traditionally has been restricted by the States, not merely as *malum prohibitum*, but as *malum in se*, by definition cannot give rise to a protected liberty interest. Moreover, the States, by definition, have a rational basis for criminalizing activities, such as abortion, that are *mala in se*.

I. ACTS TRADITIONALLY CLASSIFIED AS *MALA IN SE* CANNOT BE PROTECTED AS "LIBERTIES" UNDER THE DUE PROCESS CLAUSE.

In *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), this Court said it was, "at best, facetious" to claim that sodomy was a fundamental right. 478 U.S. at 194. The Court explained that proscriptions against sodomy had "ancient roots," that "[s]odomy was a criminal offense at common law," and had been "forbidden

by the laws of the original 13 States." *Id.* at 192. Moreover, sodomy was a crime in 32 of the 37 states when the Fourteenth Amendment was ratified, and was still criminalized in 24 states when *Bowers* was decided. *Id.* at 192-194. "Against this background" the Court quickly rejected the notion that sodomy was " 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty.' " *Id.* at 194, *quoting Moore* v. *East Cleveland*, 431 U.S. 494, 503 (1977), and *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937).

Justice Scalia has advocated a similar mode of analysis for weighing all claimed liberty interests under the Fourteenth Amendment.[1] In his plurality opinion in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989), Justice Scalia concluded that a natural father could not claim a liberty interest under the Fourteenth Amendment in maintaining a relationship with a child he adulterously fathered, at least where the child's mother and her husband objected.[2]

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[1] Justice Scalia has also suggested a similar regimen for evaluating procedural due process claims. *See Burnham* v. *Superior Court*, 495 U.S. 604 (1990) (plurality opinion) (personal jurisdiction based only on in-state service of process constitutional under Due Process Clause because of historical acceptance); *see also Schad* v. *Arizona*, 111 S. Ct. 2491, 2507 (1991) (Scalia, J., concurring in part and concurring in the judgment) (submitting to jury different theories of murder under single charge permissible under Due Process Clause because comports with historical norm); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1046-1054 (1991) (Scalia, J., concurring) (punitive damages constitutional under Due Process Clause because of historical acceptance).

[2] Chief Scalia's opinion was joined in full by Chief Justice Rehnquist, and in part by Justices O'Connor and Kennedy,

Justice Scalia rejected the proposition that such relationships could give rise to a liberty interest, because they had never received any legal protection historically.

Beginning, like *Bowers*, with the common law, the *Michael H.* plurality traced the history of presumptions of legitimacy and found not "a single case, old or new" that had awarded "substantive parental rights to the natural father of a child conceived within and born into, an extant marital union that wished to embrace the child." 491 U.S. at 127. "This," the plurality concluded, "is not the stuff of which fundamental rights qualifying as liberty interests are made." *Ibid. See also Cruzan* v. *Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2859-60 (1990) (Scalia, J., concurring) (no liberty interest in suicide because suicide has been criminalized ever since the common law); *cf. Reynolds* v. *United States*, 98 U.S. (8 Otto) 145, 164-165 (1878) (noting that at "common law, the second marriage was always void" and that all the States prohibited polygamy, and holding "[i]n the face of all this evidence it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation" outlawing polygamy). In short, the Court's analysis in *Bowers*, and Justice Scalia's analysis in *Michael H.* and *Cruzan* each lead to the conclusion

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who agreed that historical analysis was proper but disagreed on the level of generality appropriate to such analysis. Whereas Justice Scalia's analysis focuses on the legal history of the specific practice in question, 491 U.S. at 127-28 n.6, Justices O'Connor and Kennedy suggested a more general inquiry might sometimes be called for—whether the specific practice was part of a more general right that itself had been protected. *Id.* at 132 (O'Connor, J., concurring).

that conduct that was historically criminalized cannot be a liberty protected by the Fourteenth Amendment.[3]

Nevertheless, the Court has at other times recognized, as being within protected liberties, other activities that one or more states have outlawed. Such activities include teaching children a foreign language, *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), or sending them to parochial schools, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). And while it is obviously true that the prohibitions in *Meyer* and *Pierce* were idiosyncratic, there is nothing in either opinion to indicate that the Court's judgment would have been any different if the rest of the states had chosen to follow Nebraska's and Oregon's lead. It is thus not dispositive that a certain type of conduct historically has or has not been criminalized; some further analysis is required.

In *amicus*'s view, the above cases are best understood as standing for the proposition that a practice that has traditionally been restricted as specifically *malum in se* is, by definition, not a protected liberty under the Fourteenth Amendment. But a practice

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[3] This approach uses tradition "for giving content only to ambiguous constitutional text," not text that is clear on its face. *Rutan* v. *Republican Party of Illinois*, 110 S. Ct. 2729, 2748 n.1 (1990) (Scalia, J., dissenting). It is thus unnecessary to parse history to determine that racial discrimination, for example, is unconstitutional. The "Fourteenth Amendment's requirement of 'equal protection of the laws,' combined with the Thirteenth Amendment's abolition of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid." *Ibid.*

that has been outlawed merely as *malum prohibitum* may still constitute such a liberty.[4]

Applying the traditional distinction between *malum in se* and *malum prohibitum* in defining liberty interests would aid this Court, and especially the State and lower federal courts, in weighing future claims under the Fourteenth Amendment. Because the common law tradition may readily be consulted on the question of what is or is not *malum in se*, it would provide a workable bright line distinction between claimed rights to activities like sodomy, polygamy, suicide, public nudity—and abortion, on the one hand, and claimed rights to qualitatively different types of behavior, on the other. Moreover, the distinction is a familiar one both to the lower courts and this Court. This Court, for example, formerly used the distinction in deciding whether a jury trial was required for prosecution of a given offense. *District of Columbia* v. *Colts*, 282 U.S. 63, 73 (1930);[5] *see also In re Ruffalo*, 390 U.S. 544, 555 (1968) (Opinion of White, J.) (suggesting *malum in se* distinction as giving content to attorney disbarment standard).

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[4] In *Michael H.*, Justice Scalia distinguished *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), on the ground that neither of "those cases acknowledged a longstanding and still extant societal tradition withholding the very right pronounced to be the subject of a liberty interest." 491 U.S. at 128 n.6 (Opinion of Scalia, J.).

[5] The Court's current analysis concentrates on the maximum penalty prescribed for the offense. *Blanton* v. *North Las Vegas*, 489 U.S. 538 (1989).

II. THERE IS, BY DEFINITION, A RATIONAL BASIS FOR RESTRICTING ACTS *MALA IN SE*.

Even criminal statutes that do not impinge on protected liberty interests require a rational basis. But the very definition of an act *malum in se* is an act that is inherently disordered and harmful. *See, e.g.*, Lafave & Scott, *Substantive Criminal Law* § 1.6 (1986). The States therefore necessarily possess rational bases for restricting acts *mala in se*.

The *Bowers* Court, for example, had little difficulty in finding a rational basis for the criminal prohibition of sodomy—the state's moral condemnation of it. As the Court noted, the law "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S. at 196. Consequently, the *Bowers* Court rejected the argument that Georgia's sodomy law was invalid simply because "majority sentiments about the morality of homosexuality" were an "inadequate" basis for it. *Ibid.* As the Court has elsewhere emphasized, the States can "legimately act . . . to protect 'the social interest in order and morality.'" *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 61 (1973) (upholding state ban or obscene displays), *quoting Roth* v. *United States*, 354 U.S. 476, 485 (1957).

In *Barnes* v. *Glenn Theatre, Inc.*, 111 S. Ct. 2456 (1991), a plurality of the Chief Justice and Justices O'Connor and Kennedy, with Justice Scalia writing separately, sounded a similar theme. In *Barnes*, the Court upheld Indiana's ban on public nudity as applied to barroom-style nude dancing. Chief Justice Rehnquist's plurality opinion noted that "[p]ublic nudity was considered an act *malum in se*" at com-

mon law and had traditionally been outlawed by the States. *Id.* at 2461. The plurality consequently found that the statute survived a First Amendment challenge because it "further[ed] a substantial government interest in protecting order and morality." *Id.* at 2462.

Justice Scalia concurred in the judgment. Because he did not find the First Amendment implicated, however, he measured the statute against the Due Process Clause. Citing to history, he found that Indiana's "moral opposition to nudity," like Georgia's moral condemnation of sodomy in *Bowers*, "supplie[d] a rational basis for its prohibition." 111 S. Ct. at 2468 (Scalia, J., concurring in the judgment).

Bowers and *Barnes* were not innovations. The "traditional police power of the States is defined as the authority to provide for the public health, safety *and morals*." *Barnes*, 111 S. Ct. at 2462 (emphasis added). Indeed, laws enacted to further community morality were always thought to be at the very core of the States' police powers, even when this Court circumscribed those powers more narrowly. *See, e.g.*, *Mugler* v. *Kansas*, 123 U.S. 623, 661 (1887) (states' "police powers . . . determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety").

These cases are more than broad enough to encompass *amicus*'s proposed rule—namely that statutes restricting or prohibiting acts traditionally described as *malum in se* by definition possess a rational basis.

III. ABORTION HAS ALWAYS BEEN REGARDED AS *MALUM IN SE*

Abortion has traditionally been regarded as an act *malum in se* because it is the deliberate taking of innocent human life. It was so regarded by the received English Common Law. *See generally* 1 W. Blackstone, *Commentaries* 129 ("Life is . . . a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb"); E. Coke, *Third Institute* 50 (1644) (abortion of a woman "quick with child" is a "great misprision"); 1 W. Hawkins, *A Treatise of the Pleas of the Crown*, ch. 31 § 16 (7th ed. 1795) (same); 1 M. Hale, *History of Pleas of the Crown* 433 (1736) (abortion a "great crime").[6]

It was so regarded by early American common law, in Pennsylvania and elsewhere. *See, e.g., Mills* v. *Commonwealth*, 13 Pa. 627, 633-34 (1850) ("The

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[6] "Quickening" was not a common law standard equivalent to *Roe*'s trimester framework. Rather, it was an evidentiary requirement necessary because of the then-primitive state of medical science. It was used as a practical test to determine whether there had been an assault upon a live human being in the womb and whether that act had caused the child's death. "At all times, the common law disapproved of abortion as *malum in se* . . . and sought to protect the child in the womb from the moment his living biological existence could be proved." R. Byrn, "An American Tragedy," 41 *Fordham L. Rev.* 807, 816 (1973). In 1827 the nature of conception was discovered. And by 1838, at least one English court had reinterpreted the common law rule prohibiting the execution of a woman "quick with child" to apply to a time prior to when the woman would actually feel the child's movements. The court explained, " 'Quick with child' is having conceived." *R.* v. *Wycherley*, 173 Eng. Rep. 486, 487 (N.P. 1838).

moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated . . . . There was therefore a crime at common law sufficiently set forth and charged in the indictment"); *Peoples* v. *Commonwealth*, 87 Ky. 487, 9 S.W. 509 (1888) (abortion a crime *malum in se*). *See also State* v. *Jones*, 2 Miss. (1 Walker) 39 (1820) (prosecuting slave owner for murder of slave; "the killing of a lunatic, an idiot, *or even a child unborn, is murder*, as much as the killing of a philosopher, and has not the slave as much reason as a lunatic, an idiot or an unborn child") (emphasis added).

That tradition continued into modern times. *See, e.g., Karger* v. *Com'r*, T.Ct.Mem. 1954-98, 13 T.C.M. (CCH) 661 (1954) ("In the long category of crimes, few, if any, are considered more reprehensible or revolting to common decency and good public morals" than abortion; even claiming tax deduction for expenses of illegal abortion is *malum in se*); *Ballurio* v. *Castellini*, 29 N.J. Super. 383, 102 A.2d 662 (1954) (abortion a crime of "moral turpitude"); *State* v. *Elliott*, 277 P.2d 754, 758 (Ore. 1954) ("Illegal abortions are *mala in se*"). *See also* Lafave & Scott, *supra*, § 1.6 (abortion *malum in se*).

There is thus no question that, until *Roe* v. *Wade*, 410 U.S. 113 (1973), the common law as it was received from England and as it continued to develop in America condemned abortion as a crime that was *malum in se*. Indeed, this Court itself had once issued a similar *dictum* about abortion. In *Ritter* v. *Mutual Life Ins. Co.*, 169 U.S. 139 (1898), it noted with approval a state court's conclusion that abortion "was condemned alike by the laws of nature and by the laws of all civilized States." *Id.* at 157, *quoting*

Hutch v. *Mutual Life Ins. Co.*, 120 Mass. 550, 552 (1895).[7]

That common law view was reinforced by state statutory law in force at the time of the ratification of the Fourteenth Amendment. *See Roe*, 410 U.S. at 175 n.1 (Rehnquist, J., dissenting) (listing statutes); *see also*, J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 200 (1978) ("most of the legislation passed between 1860 and 1880 explicitly accepted the . . . assertions that the interruption of gestation at any point in a pregnancy should be a crime and that the state itself should try actively to restrict the practice of abortion."); J. Noonan, *A Private Choice* 51-52 (1979).[8]

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[7] *Cf. Union Pacific R.R.* v. *Botsford*, 141 U.S. 250, 253 (1891) ("The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother").

[8] *Amicus* continues to believe that the most fundamental flaw in *Roe* was its refusal to recognize the unborn as persons within the meaning of the Fourteenth Amendment. *See* 410 U.S. at 158. The text of the Fourteenth Amendment itself sets out only two classes of individual: "citizens," who must be born or naturalized in the United States and for whom the privileges and immunities of citizenship are assured, and "persons," a broader class not circumscribed by any specified criteria and for whom the fundamental rights of life, liberty, and property are guaranteed. Lacking any affirmative command to exclude unborn children from the Fourteenth Amendment, the Court should apply "the rule that constitutional provisions for the security of person and property should be liberally construed," *Boyd* v. *United States*, 116 U.S. 616, 635 (1886), and give the word person the broadest possible reading.

Indeed, this Court decided early on that "person" was expansive enough to encompass corporations. *Santa Clara*

It was still the prevailing view in the law of Pennsylvania and the majority of other states when *Roe* was decided. *See* G. Linton, "Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis," 67 *U. Det. L. Rev.* 157, 255-57 (1990) (listing states).

To be sure, a debate over whether to legalize some abortions had recently been joined in some states at the time *Roe* was handed down. It was, however, a debate that was never finished, but was instead abruptly interrupted by the *Roe* Court's pronouncement. So for the past nineteen years the focus of discussion has not been the wisdom and correctness of several centuries of criminal law, but the wisdom and correctness of *Roe*. And the forum of choice has not been the legislatures but this Court. Moreover, following *Roe* the Court handed down a series of cases, beginning with *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976), that demonstrated to the States the practical futility of attempting to regulate abortion further. Thus, the fact that some states permitted some abortions in 1973, or that most do now, is not enough to dispel the consensus of several centuries that abortion is *malum in se*.

County v. *Southern Pac. R.R.*, 118 U.S. 394 (1886). If the Fourteenth Amendment can reach entities that exist solely in the imagination of the law, it can surely embrace unborn human beings. Indeed, when considered in light of *Santa Clara*, *Roe* takes on a "hauntingly Orwellian" character: "something can be a person without being human, and can be human without being a person." East and Valentine, "Reconciling *Santa Clara* and *Roe* v. *Wade*," in *Abortion and the Constitution* 90 (D. Horan, E. Grant, P. Cunningham eds. 1987). Our argument on this point is set forth more fully in our brief *amicus curiae* in *Webster* v. *Reproductive Health Servs.*, No. 88-605.

It is merely the legacy of the distortion that *Roe* has worked on the political process. Indeed, there are signs that the former consensus is, at least in part, re-emerging. Louisiana, Utah, and the Territory of Guam have all recently enacted legislation severely restricting abortion.[9]

In sum, because abortion is an act *malum in se* it cannot be a protected liberty under the Due Process Clause. And for precisely the same reason there is a rational basis for its restriction or outright prohibition.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed, except insofar as it invalidated Pennsylvania's spousal notification requirement, and *Roe* v. *Wade* should be overruled.

Respectfully submitted,

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[9] Unanimity is unnecessary in any event. Only a minority of states still outlawed sodomy when *Bowers* was decided. 478 U.S. at 193.